Supreme Court, U.S.
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No. 06-559

In The

Supreme Court of the United States

JERRI SCHACK, Personal Representative for the Estate of LAWRENCE SCHACK, Deceased,

Petitioner,

v.

CITY OF TAYLOR; POLICE OFFICER MICHOWSKI; POLICE OFFICER SHREWSBURY; POLICE OFFICER MICHAEL ZACHARY; CADET YESTA; CADET JONES; CADET MICHALIK; CADET JAMES PILCHECK and CADET BRIAN KREGER,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Eighth and Fourteenth Amendments to the United States Constitution prohibit cruel and unusual punishment. In *Rhoades v. Chapman*, 452 U.S. 337, 346 (1981), this Court held that "no static test can exist by which courts determine whether conditions of confinement are cruel and unusual, for the Eighth Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." In *Helling v. McKinney*, 509 U.S. 25 (1993), the Court held that contemporary standards of decency require governmental custodians to provide, *inter alia*, reasonable safety to inmates and pre-trial detainees.

Here, the Sixth Circuit concluded that "placing an intoxicated man, even a highly intoxicated man, in a detoxification cell while awaiting booking does not violate contemporary standards of decency." By creating such a *per se* rule, the Sixth Circuit has concluded that regardless of their condition, pretrial detainees do not require safety precautions simply because they are 'intoxicated.'

I. Does the Sixth Circuit's creation of a *per se* rule that intoxicated inmates do not require any safety precautions violate contemporary standards of decency in contravention of the Eighth and Fourteenth Amendment's prohibition against cruel and unusual punishment?

LIST OF PARTIES

The parties are listed in the caption.

CORPORATE DISCLOSURE STATEMENT

None of the parties is a privately or publicly held company to which Rule 29.6 applies.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Jerri Schack respectfully petitions this Court for a writ of certiorari to review the opinion rendered by the Sixth Circuit Court of Appeals.

OPINIONS BELOW

The April 17, 2006 panel decision of the Sixth Circuit was not recommended for full-text publication and is printed at Appendix A at App. 1. The petition for rehearing *en banc* was denied without opinion in an unpublished order dated July 25, 2006. App. 34.

The March 23, 2005, Memorandum Opinion and Order of the United States District Court for the Eastern District of Michigan denying Defendants' Motion for Summary Judgment is unreported, but printed herein at Appendix B at App. 13.

JURISDICTION

This Court's jurisdiction is properly invoked under 28 U.S.C. § 1254(1).

The Sixth Circuit issued its opinion on April 17, 2006, and its order denying rehearing *en banc* on July 25, 2006. This petition is timely under 28 U.S.C. § 2101 and Supreme Court Rule 13.1 because it is being filed within 90 days of the entry of the order sought to be reviewed.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner relies upon 42 U.S.C. § 1983, which provides, in relevant part, as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory of the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .

Petitioner also relies upon the Fourteenth Amendment of the Constitution which extends to pretrial detainees the Eighth Amendment's prohibition against cruel and unusual punishment.

STATEMENT OF THE CASE

I. OVERVIEW OF UNDISPUTED FACTS

This case involves the tragic death of Lawrence Schack, a 60-year-old highly intoxicated man, who fell, violently struck his head against the concrete wall of a detoxification holding cell at the City of Taylor's police department, and lay there for about 15 hours until he was discovered dead. An autopsy revealed that Lawrence died from a sub-dural hemorrhage sustained as a consequence of a presumed fall. All of the relevant facts surrounding Schack's incapacity and fatal fall are captured on video

surveillance and were made part of the district court's record.

Leading up to his death, around 9:00 pm that evening, Schack was taken to the Taylor Police Department where he was being held for disorderly intoxication. His blood alcohol content was four times the legal limit, he could not walk or stand without assistance, he could not remove his shoes or other clothing, and his speech was slurred. Schack was so incapacitated that Respondents could not process his booking at that time so instead they put him in a detoxification cell where he was left completely unattended and unobserved in a complete state of helplessness. Moments later, Schack tried to stand on his feet, immediately fell striking his head against the concrete wall. Schack lay there for almost 15 hours until he was found dead.

As personal representative for her father, Jerri Schack filed the instant action under 42 U.S.C. § 1983 claiming that Respondents were deliberately indifferent to Lawrence Schack's serious medical condition thereby violating the Fourteenth and Eighth Amendments' prohibition against cruel and unusual punishment. Specifically, Petitioner claimed that Schack should not have been left unattended in such a state of intoxication without reasonable precautions to safeguard his well-being.

II. DISTRICT COURT OPINION

The district court concluded that there were genuine issues of material fact as to Petitioner's claims of deliberate indifference and therefore denied Respondents' Motion for Summary Judgment. The district court characterized a claim of deliberate indifference as containing both an

objective and subjective component. The district court emphasized that under the objective component, an inmate or pretrial detainee must show that the alleged deprivation is sufficiently serious to warrant protection.

Specifically, the district court relied on the Supreme Court's decision in *Farmer v. Brennan*, 511 U.S. 825, 834 (1994), wherein this Court held that an inmate, or pretrial detainee, must show that he is incarcerated under conditions posing a substantial risk of serious harm. In this case, the district court pointed out that "[d]ecedent was so intoxicated that he could not stand or walk on his own. Decedent was so intoxicated that he could not be processed at the police station due to his physical inabilities, which resulted from his extreme intoxication." App. 20. Based on these undisputed facts, the court concluded that Schack was at risk for falling on the concrete and cinder block surfaces of the cell. Thus, the district court concluded that Petitioner met the objective component of her Eighth Amendment deliberate indifference claim.

III. SIXTH CIRCUIT OPINION

On Respondents' interlocutory appeal, a three-judge panel of the Sixth Circuit reversed the district court and remanded the case for entry of summary judgment in favor of Defendants. In reaching its conclusion, the panel recognized that a claim of deliberate indifference contains both an objective and subjective component. The Court then concluded, however, that Petitioner failed to meet the objective component of the test. App. 7.

Specifically, the panel adopted a *per se* rule that "[p]lacing an intoxicated man, even a highly intoxicated man, in a detoxification cell while awaiting booking does

not violate contemporary standards of decency." App. 7. The Sixth Circuit reached this conclusion with scant explanation or analysis. Under this *per se* rule, the Sixth Circuit concluded that Petitioner could not, as a matter of law, meet the objective component of her Eighth Amendment claim and thus her claim must fail.

REASONS FOR GRANTING THE PETITION

I. The Sixth Circuit's Decision Conflicts with Supreme Court Precedent Admonishing the Use of a 'Static Test' To Determine Whether Conditions of Confinement Are Cruel and Unusual

The Sixth Circuit has created an inflexible and static *per se* rule denying the protections of the Eighth Amendment to all inmates and pretrial detainees who are incapacitated by intoxication. Such a blanket exemption directly conflicts with this Court's decision in *Rhodes v. Chapman*, 452 U.S. 337 (1981), where the Supreme Court expressly rejected the use of a 'static' test to determine whether conditions of confinement are cruel and unusual.

In *Rhodes*, the Supreme Court considered whether certain conditions of confinement were cruel and unusual under the Eighth Amendment. In deciding whether certain conditions of confinement are cruel and unusual, the Court expressly rejected the use of a 'static test' to dismiss claims of deliberate indifference. Specifically, the *Rhodes* Court held:

> No static "test" can exist by which courts determine whether conditions of confinement are cruel and unusual, for the Eighth Amendment "must

> draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958). The Court has held, however, that "Eighth Amendment judgments should neither be nor appear to be merely the subjective views" of judges. *Rummel v. Estelle*, 445 U.S. 263, 275 (1980).

Rhodes, 452 U.S. at 346.

Here, the Sixth Circuit squarely violated *Rhodes* by adopting a *per se* static test that highly intoxicated individuals, ***regardless of their condition***, do not require any safety precautions. Adopting such a rule not only ignores the *Rhodes* decision, but more dangerously allows the courts within the circuit to disregard an infinite number of circumstances under which a highly intoxicated individual may pose specific safety threats to himself while confined.

In the twenty-five years following the Supreme Court's decision in *Rhodes*, this Court has stressed the importance of scrutinizing prison conditions. For instance, in *Helling v. McKinney*, 509 U.S. 25, 32 (1993), this Court examined whether an inmate stated an Eighth Amendment claim of deliberate indifference where he was housed in a cell with another inmate who smoked five packs of cigarettes per day. The inmate claimed that his compelled exposure to environmental tobacco smoke (ETS) unreasonably endangered his future health. The trial court disagreed and concluded as a matter of law that the inmate had no constitutional right to be free from cigarette smoke.

The Ninth Circuit Court of Appeals reversed and found that the inmate's exposure to ETS may pose an unreasonable danger to his future health; therefore, plaintiff stated a constitutional claim under the Eighth Amendment. The government defendants sought a writ of certiorari from this Court again contending that the Eighth Amendment simply did not apply to an inmate exposed to ETS. This Court granted certiorari and affirmed the decision of the Ni..th Circuit finding that compelled exposure to ETS states a cognizable constitutional claim under the Eighth Amendment.

In finding that the inmate had stated a constitutional claim, this Court found that an inmate meets the objective component of an Eighth Amendment deliberate indifference claim by showing that the conditions of confinement pose a sufficiently serious harm, and that failure to take reasonable safety precautions increases the likelihood of injury. Under *Helling*, a claim of deliberate indifference

> also requires a court to assess whether society considers the risk that the prison complains of to be so grave that it violates contemporary standards of decency to expose *anyone* unwillingly to such a risk. In other words, the prisoner must show that the risk of which he complains is not one that today's society chooses to tolerate.

Helling, 509 U.S. at 36. The *Helling* Court found that an inmate's increased exposure to ETS may very well endanger his health and thus the inmate met the objective component of his Eighth Amendment claim.

The *Helling* Court explained why the protections of the Eighth Amendment extended to compelled exposure to ETS:

> When the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well being. . . . The rationale for this principle is simple enough: when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs – e.g., food, clothing, shelter, medical care, and *reasonable safety* – it transgresses the substantive limits on state action set by the Eighth Amendment. . . .

Helling, 509 U.S. at 32 (emphasis added).

To determine whether certain conditions of confinement are cruel and unusual, this Court has indicated that such conditions of confinement cannot violate contemporary standards of decency and such a determination "'should be informed by objective factors to the maximum possible extent.'" *See Rhodes*, 452 U.S. at 346 (quoting *Rummel*, 445 U.S. at 274-75); *see also Helling*, 509 U.S. at 32. Whether an inmate's medical needs are sufficiently serious to warrant attention must be considered under the specific circumstance presented and not by use of a *per se* static test.

In this case, the Sixth Circuit has provided no basis for its decision to carve out a blanket exception to the protections of the Eighth Amendment. Instead, the court merely substituted its subjective beliefs that intoxicated individuals, regardless of their condition, do not require

safety precautions while confined. App. 7. As this Court has stated, "'Eighth Amendment judgments should neither be nor appear to be merely the subjective views' of judges." *Rhodes*, 452 U.S. at 346 (quoting *Rummel*, 445 U.S. at 275). The Sixth Circuit's decision in this case is a dangerous step toward gutting the Eighth Amendment of its protections by disregarding numerous safety risks posed by intoxicated detainees.

The constitutional question presented in this petition is neither fact-specific nor limited to this particular case. To the contrary, this decision sweeps broadly across every prison, jail, and detention center located within the boundaries of the Sixth Circuit. This decision sends a clear message that custodian officials may relax safety precautions and ignore the serious medical conditions related to intoxication. The Eighth and Fourteenth Amendments must guard against such arbitrary treatment of inmates by preventing such *per se* rules as to what constitutes cruel and unusual conditions of confinement. The Sixth Circuit's decision dangerously chips away at the protections of the Eighth and Fourteenth Amendments. This decision simply cannot be left to stand.

II. The Sixth Circuit's Decision Also Conflicts with Numerous Other Circuits That Would Have Reached a Different Result

The Sixth Circuit's decision also conflicts with several circuits that have specifically found that alcohol related illnesses are sufficiently serious to warrant safety precautions. *See Thompson v. Upshur County, TX*, 245 F.3d 447, 457 (5th Cir. 2001) (noting that police officers took extra precautions, similar to suicidal inmates, for highly intoxicated inmate); *Lancaster v. Monroe Co.*, 116 F.3d 1419,

1426 (11th Cir. 1997); *Morrison v. Washington Co.*, 700 F.2d 678 (11th Cir. 1983) (establishing that sheriffs and jailers cannot keep a chronic alcoholic in jail without any medical supervision when he is suffering from severe alcohol withdrawal).

In *Lancaster*, the Eleventh Circuit held that ignoring the dangers of alcohol withdrawal and waiting for a "manifest emergency" before summoning medical help constituted deliberate indifference. In that case, despite numerous warnings from the deceased's wife, Harold Lancaster died from an intracranial hemorrhage after he fell from his bunk and struck his head on the floor of his cell.

In *Thompson*, the Fifth Circuit considered whether defendants were entitled to qualified immunity after failing to provide medical attention to a pretrial detainee who suffered and eventually died from delirium tremens (DTs). Thompson was arrested for driving while intoxicated and placed in a county jail. While confined, he started seeing snakes coming out of the walls, requested a screwdriver so that he could build a house, and thought that he was at a barbeque. Paramedics confirmed that Thompson was experiencing DTs and warned that Thompson required medical treatment which was never provided. Thompson was then transferred to another facility and placed in a detoxification cell where he soon began more erratic behavior. He fell and struck his head against the window, floor, and concrete bench in his cell after which he was placed in a straight jacket. Shortly thereafter, Thompson suffered a seizure and died moments later.

Thompson's parents filed suit under § 1983 claiming that the custodian officials failed to provide reasonable

medical care to their son which resulted in his death. The district court denied defendants' motion for summary judgment on the basis of qualified immunity and defendants appealed. In considering whether defendants were entitled to qualified immunity, the Fifth Circuit first determined that DTs was a serious medical condition for which defendants were obliged to treat under the Eighth and Fourteenth Amendments.

Both *Lancaster* and *Thompson* stand for the simple proposition that a highly intoxicated inmate may require certain safety precautions to prevent injury or death. The Sixth Circuit's decision allows government custodians to simply turn a blind eye to numerous situations where intoxicated inmates are at risk for injury or death. In this regard, the Sixth Circuit's decision is completely at odds with both the Fifth and Eleventh Circuits.

If the instant case would have been decided in either the Fifth or Eleventh Circuits, those courts would have concluded that Petitioner stated a constitutional claim based on Respondents' failure to provide reasonable safety measures to a man who was so intoxicated that he could not stand on his own feet. In either of those jurisdictions, the courts would have found that Petitioner presented a cognizable constitutional claim under the Eighth and Fourteenth Amendments. The Sixth Circuit's decision squarely conflicts with the well-reasoned precedent of other circuits that have consistently found that the Eighth and Fourteenth Amendment's prohibition against cruel and unusual punishment extend to intoxicated pretrial detainees.

For this reason, Petitioner prays that this Honorable and Supreme Court grant the instant petition for writ of

certiorari, or summarily reverse the decision of the Sixth Circuit and remand this matter to the district court. Additionally, this case presents an ideal vehicle for this Court to further develop criteria as to what types of prison conditions violate contemporary standards of decency. There are no procedural defects in this case, and the facts are undisputed. The issue presented is a pure issue of constitutional law that significantly affects how inmates and pretrial detainees are treated by governmental custodians.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted. Alternatively, the Court should summarily reverse the decision of the Sixth Circuit, affirm the decision of the district court, and remand to the district court for further proceedings.

Respectfully submitted,

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Dated: October 20, 2006

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APPENDIX A

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
File Name: 06a0268n.06
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No. 05-1481

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JERRI SCHACK, Personal Representative for the Estate of Lawrence Schack, Deceased, Plaintiff-Appellee, v. CITY OF TAYLOR; Police Officer Michowski; Police Officer Shrewsburg; Police Officer Michael Zachary; Cadet Yesta; Cadet Jones; Cadet Michalik; Cadet James Pilcheck; Cadet Brian Kreger, Defendants-Appellants.	On Appeal from the United States District Court for the Eastern District of Michigan

Before SUHRHEINRICH, ROGERS, and COOK, Circuit Judges.

COOK, Circuit Judge. Plaintiff, representing the estate of Lawrence Schack, alleges that Defendants deliberately ignored a substantial risk of serious harm and acted with gross negligence when they placed Schack in a detoxification cell where he fell, hit his head, and suffered an internal brain hemorrhage that led to his death.

Because Defendants' actions do not amount to a Fourteenth Amendment violation or gross negligence, we reverse the district court's denial of Defendants' motion for summary judgment, and remand for entry of judgment in favor of Defendants.

I

Officers of the Defendant City of Taylor's police department arrested Schack for disorderly intoxication. Prior to the arrest, Schack refused offers of medical assistance from EMT personnel on the scene. When the officers arrived at the police station with Schack in custody, they turned him over to Cadets Krieger and Pilchack for processing. As the cadets led Schack into the booking room, he lost his balance twice and had to be supported by the cadets and officers. Due to Schack's intoxication, as well as some alleged belligerence, the processing cadets decided not to process Schack at that time, but rather to place him in a detoxification cell until he "sober[ed] up a little bit." The cell was monitored via video camera and visible to the officers on duty. Shortly after being placed in the cell, as recorded on the videotape but unbeknownst to the cadets, Schack stood up from the cell's bench, fell over, and hit his head on a concrete wall. As later determined, this impact caused internal bleeding near Schack's brain.

In the hours succeeding the fall, Schack repositioned himself in the cell at least twice, and the cadets also repositioned him at least twice when checking on him. Throughout the night, the cadets observed Schack sleeping

and heard him "snoring."[1] Cadet Krieger testified that he spoke with Schack during the night and asked him if everything was okay, to which Schack responded in the affirmative. Cadet Lyson testified that, around noon the next day, he observed Schack sleeping and snoring, although Plaintiff's medical expert opined that Schack was probably dead by about 10:15 a.m. In any event, at 12:15 p.m., Lyson observed that Schack was not breathing and appeared discolored. He summoned emergency personnel who transported Schack to the hospital where Schack was pronounced dead.

Schack's estate sued a number of defendants, including the appellants here: the City of Taylor; arresting officers Michowski and Shrewsbury; Cadets Krieger and Pilchak, who put Schack in the detoxification cell; and Cadet Yesta, who was on duty through the night. Plaintiff alleged that the City failed to adequately train its police force and that the individual defendants violated the Fourteenth Amendment through deliberate indifference to Schack's safety. Plaintiff also brought various state-law claims.

Defendants moved for summary judgment, claiming qualified immunity shielded them from the Fourteenth Amendment claim and the failure-to-train claim. The district court denied the motion, finding a genuine issue of material fact as to whether they acted with deliberate indifference. The court also denied Defendants' motion for summary judgment on Plaintiff's state-law gross-negligence

[1] Plaintiff claims that what Defendants thought to be Schack's snoring was actually his lungs filling with fluid, but Plaintiff does not dispute that Defendants believed Schack to be snoring.

claim, but granted their motion with respect to Plaintiff's other claims.

II

We review the denial of summary judgment on qualified immunity grounds de novo, *Scicluna v. Wells,* 345 F.3d 441, 444 (6th Cir. 2003), reviewing only the legal issue of whether the facts, taken in the light most favorable to the plaintiff, demonstrate that the defendants violated clearly-established law. *See Estate of Owensby v. City of Cincinnati,* 414 F.3d 596, 602 (6th Cir. 2005). To determine whether qualified immunity shields Defendants from liability, we first determine whether Defendants violated a constitutional right. *See Saucier v. Katz,* 533 U.S. 194, 201 (2001). If so, we then determine whether the right was so clearly established that a reasonable officer would have known that his actions violated that right. *Id.* at 201-02.

A. Plaintiff's Fourteenth Amendment Claims

Pretrial detainees have a right under the Fourteenth Amendment's Due Process Clause analogous to a prisoner's Eighth Amendment right to be free from cruel and unusual punishment. *Weaver v. Shadoan,* 340 F.3d 398, 410 (6th Cir. 2003). A detainee may claim a Fourteenth Amendment violation based on a state actor's "failure to prevent harm" in the conditions of confinement – that is, the failure to take reasonable measures for the safety of the detainee. *See Farmer v. Brennan,* 511 U.S. 825, 832-34 (1994) (describing Eighth Amendment guarantees). Such a claim requires a showing that the state actor knew that there was an "excessive risk" to the detainee's health or safety, also described as a "substantial risk of serious

harm." *Id.* at 837 ("We hold . . . that a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.").

A claim for failure to prevent harm will succeed where prison officials act with "deliberate indifference." *Farmer,* 511 U.S. at 828. Deliberate indifference is akin to criminal recklessness. *Weaver,* 340 F.3d at 410; *see Farmer,* 511 U.S. at 837. It is "a very high standard of culpability, exceeding gross negligence." *Ross v. Duggan,* 402 F.3d 575, 590 n.7 (6th Cir. 2004) (quotation omitted). The test for deliberate indifference is both an objective and subjective one: the detainee must be subjected to a substantial risk of serious harm, and the prison official must actually know of and disregard the risk. *Brown v. Bargery,* 207 F.3d 863, 867 (6th Cir. 2000).

Plaintiff alleged that Defendants subjected Schack to a substantial risk of serious harm in deliberate indifference to his health and safety. At oral argument, Plaintiff's counsel identified the culpable conduct as Defendants' decision to place an extremely inebriated Schack in the detoxification cell.[2]

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[2] It was unclear from Plaintiff's complaint and appellate brief whether Plaintiff's claim centered on Defendants' putting Schack in the cell, their failure to discover Schack's internal wounds through closer monitoring, or both. Thus counsel was asked at oral argument to clarify Plaintiff's claim. We note that claims against Defendant Yesta, whose

(Continued on following page)

The district court concluded that Defendants acted with deliberate indifference. The court found evidence that Defendants actually knew of a substantial risk because Cadet Krieger testified that he recognized an increased risk that a drunk person could fall. The court also found that there was a risk of serious harm because the cell had a concrete and cinder-block wall.

Defendants argue that the district court's conclusion that Schack was "so intoxicated that he could not stand or walk on his own" was contrary to the cadets' undisputed deposition testimony. As Defendants note, the cadets testified that they escorted Schack into the detoxification cell because of his belligerence. But the cadets also admitted that they had some concern that Schack could fall due to his intoxication, and the police station video depicts Schack walking unsteadily. Thus, construing the facts in the light most favorable to the Plaintiff, Schack's ability to stand or walk on his own was limited.

But the cadets did not leave Schack *standing or walking* in the detox cell; they sat Schack on a bench in the cell, and he remained sitting as they left the cell. Even assuming the cadets recognized the risk that after they left the cell Schack might try to stand and might fall, recognition of an *increased* risk of Schack *falling* is not equivalent to recognition of a *substantial* risk of *serious* harm. Nothing indicates that the officers actually foresaw an injury of this magnitude and maintained their course of conduct in defiance of the risk of harm.

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shift began well after Schack had already been placed in the detoxification cell, cannot survive under Plaintiff's theory.

Even if Plaintiff could meet the subjective component of deliberate indifference by showing that the officers recognized a substantial risk to Schack, Plaintiff fails to meet the objective component of the test. Schack in fact sustained a serious injury, but this does not necessarily indicate a substantial risk of such an injury. In conditions-of-confinement challenges like this one, a claimant must establish an "excessive risk." *See Farmer,* 511 U.S. at 837; *Jarriett v. Wilson,* 162 Fed. Appx. 394, 402 (6th Cir. 2005). "Additionally, the prisoner must demonstrate that the risk is one which society deems so grave that it violates contemporary standards of decency to expose anyone unwillingly to such a risk." *Talal v. White,* 403 F.3d 423, 426 (6th Cir. 2005) (quotation and emphasis omitted); *see also Phelps v. Kapnolas,* 308 F.3d 180, 185 (2d Cir. 2002) ("Ultimately, to establish the objective element of an Eight[h] Amendment claim, a prisoner must prove that the conditions of his confinement violate contemporary standards of decency.").

Placing an intoxicated man, even a highly intoxicated man,[3] in a detoxification cell while awaiting booking does not violate contemporary standards of decency. *See generally Samples v. Logan County,* No. C2-03-847, 2006 WL 39265, at *1 & n.2 (S.D. Ohio Jan. 6, 2006) (noting without apparent surprise that the claimant was placed in a holding cell because "[i]f an inmate is too intoxicated to participate meaningfully in this booking process, the booking officer gives the inmate time to sober up"); *Weaver,*

[3] We note that Plaintiff has not alleged that Schack exhibited symptoms of any alcohol-related ailment requiring immediate medical attention; rather, Plaintiff quarrels only with Defendants' decision in light of the risk of Schack's falling.

340 F.3d at 404 (noting that officers put a man in a cell where the man was mumbling and had to be assisted by two jailers into the jail); *Ross v. Meyers,* 883 F.2d 486, 487 (6th Cir. 1989) (noting, in description of facts, that DWI arrestee was placed in holding cell). Additionally, the district court, in granting Defendants' motion for summary judgment on Plaintiff's claims of intentional infliction of emotional distress, held that there was no evidence of conduct "so outrageous in character and so extreme in degree that it goes beyond all possible bounds of decency." Perhaps the Taylor detoxification cell could have been better arranged to guard against falls, but Defendants' placing Schack in the cell did not violate contemporary standards of decency. Thus Defendants' actions do not run afoul of the Eighth Amendment prohibition against cruel and unusual punishment, as applied to Schack via the Fourteenth Amendment.

Turning to the City of Taylor's appeal, we note that, although the denial of the City's summary judgment motion is not appealable as a collateral order, we may exercise pendent jurisdiction where, as here, "the appealable and non-appealable issues are inextricably intertwined." *Tucker v. City of Richmond,* 388 F.3d 216, 224 (6th Cir. 2004) (quotation omitted) (exercising pendent jurisdiction over city's appeal where the court found no constitutional violation by individual defendants). The city cannot be liable to Plaintiff "[i]f no constitutional violation by the individual defendants is established." *Watkins v. City of Battle Creek,* 273 F.3d 682, 687 (6th Cir. 2001). In light of our holding that the individual defendants did not act with deliberate indifference, Plaintiff's constitutional claims against the City fail.

B. Plaintiff's State-Law Claims

Under Michigan law, government agents are immune from liability for most torts committed "in the course of employment or service." Mich. Comp. Laws § 691.1407(2). But if the agent's conduct amounts to "gross negligence," immunity is lost. *Id.* Plaintiff claims that Defendants acted with gross negligence "in not providing medical care and placing Mr. Schack in the cell when an injury was highly likely, and after the injury did occur, allowing him to remain there without attention until he died." The district court found a genuine issue of material fact on Plaintiff's gross negligence claim against the individual defendants "[i]n light of the fact . . . that a genuine issue of fact has been established relative to the Fourteenth Amendment due process constitutional violation."

1. Appealability

Plaintiff maintains that Defendants' appeal of the denial of summary judgment on the state-law claim is not properly before us. In determining whether we may hear an appeal based on state-law immunity, we determine whether the collateral order doctrine applies – that is, whether "the state has extended an underlying substantive right to the defendant official to be free from the burdens of litigation." *Marrical v. Detroit News, Inc.,* 805 F.2d 169, 172 (6th Cir. 1986); *see also Walton v. City of Southfield,* 995 F.2d 1331, 1343 (6th Cir. 1993). Although we held in *Marrical* and *Walton* that Michigan law did not extend such a right to government officials, a 2002 amendment to the Michigan court rules cloaked government officials with immunity from the burdens of litigation for official conduct that is not grossly negligent. *See Bradley v. City of Ferndale,* 148 Fed. Appx. 499, 511-12

(6th Cir. 2005); *see also* Mich. Court Rules § 7.202(6)(a)(v) (providing that, for purposes of appeal, the term "final order" includes "[a]n order denying governmental immunity to a governmental party"). We will therefore consider Defendants' appeal.

2. Gross Negligence

To overcome governmental immunity, Plaintiff must offer evidence that Defendants acted with gross negligence. Gross negligence is "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." Mich. Comp. Laws § 691.1407(7)(a). The Michigan Court of Appeals has described gross negligence as "almost a willful disregard of precautions or measures to attend to safety and a singular disregard for substantial risks." *Tarlea v. Crabtree,* 687 N.W.2d 333, 339 (Mich. Ct. App. 2004). Although gross negligence is generally an issue of fact, it is appropriate for summary judgment where reasonable minds could not differ. *Tarlea,* 687 N.W.2d at 338.

Two analogous cases help to define the contours of Michigan gross-negligence law. In *Conley v. Bobzean,* No. 257276, 2006 WL 73630 (Mich. Ct. App. Jan. 12, 2006), the Michigan Court of Appeals addressed a claim that officers acted with gross negligence toward an intoxicated man. The man had been involved in a "physical altercation" when the officers arrived on the scene. *Id.* at *1. Rather than taking the intoxicated man into custody, the officers drove him to a different location as requested by the man's companion. *Id.* at *2-*3. At the new location, the man became entangled in another altercation and was killed. *Id.* at *3. The court held that, although the officers could

have done more to decrease the risk, "no reasonable person could conclude that defendants' conduct was grossly negligent." *Id.*

In *Rogers v. City of Port Huron,* 833 F.Supp. 1212 (E.D. Mich. 1993), officers were called to assist an unconscious man on the side of the road. *Id.* at 1214. Unable to wake the man, the officers noted that he was breathing normally, that he did not show any signs of injury, and that he smelled of alcohol. *Id.* at 1214. The officers told bystanders that the man was intoxicated and needed to sleep it off, and that they would check on him later. *Id.* at 1215. The officers left the scene to respond to another call, but were called back later when bystanders found the man injured and lying partly in the street. *Id.* The man was taken to the hospital where he died. *Id.* Applying Michigan law, the court held:

> [T]he Officers' conduct did not constitute gross negligence. At worst, the Officers' conduct can be characterized as an error in judgment, which may be negligence. . . . It cannot be stated that the Officers' conduct was so reckless as to demonstrate a substantial lack of concern for whether injury results.

Id. at 1223 (quotation omitted).

Here, no reasonable person could find Defendants grossly negligent in leaving Schack sitting in the detoxification cell. A reasonable person, even having anticipated Schack's attempting to stand, would not likely have anticipated the degree of harm caused, and nothing about Schack's placement in the cell indicates "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." Mich. Comp. Laws § 691.1407(7)(a).

Defendants failed to secure medical treatment for Schack, but they had no reason to suspect that he was injured. They frequently saw him sleeping and heard what they believed to be snoring, and they had a reasonable basis to believe that he would be sleeping very heavily, given his drunken state. Plaintiff does not contend that Schack exhibited any visible signs of injury. Even if we assume Defendants acted negligently in placing Schack in the cell or in not obtaining medical treatment, this does not preclude summary judgment on Plaintiff's gross-negligence claims. *Maiden v. Rozwood,* 597 N.W.2d 817, 824 (Mich. 1999). No reasonable juror could find that Defendants acted with gross negligence, and we conclude that the district court erred in denying summary judgment on this claim.

III

We reverse the district court's denial of summary judgment and remand the case for entry of summary judgment in favor of Defendants.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Jerri Schack, Personal Representative for the Estate of Lawrence Schack, Deceased,

Plaintiff,

v.

City of Taylor; Police Officer Michowski; Police Officer Shrewsburg; Police Officer Michael Zachary; Cadet Yesta; Cadet Jones; Cadet Michalik; Cadet James Pilcheck and Cadet Brian Kreger,

Defendants. /

Case No. 03-CV-70980-DT
The Hon.
Denise Page Hood
United States
District Judge

MEMORANDUM OPINION AND ORDER

I. INTRODUCTION

This is a 42 U.S.C. § 1983 case involving a pre-trial detainee. This matter is before the Court on Defendants' Motion for Summary Judgment. Plaintiff, personal representative for the estate of Decedent, Lawrence Schack, brought this lawsuit against the City of Taylor and several of its police officers and cadets alleging that Decedent's constitutional right to receive medical attention was violated while being held in a detoxification cell at the Taylor Police Department. Plaintiff also alleges that Defendant, City of Taylor, is responsible for the individual Defendants' acts of alleged gross negligence, battery and intentional infliction of emotional distress relative to their

treatment of Decedent while in custody pursuant to a respondeat superior theory. Finally, Plaintiff asserts that Defendants were grossly negligent in hiring and failing to train and supervise its law enforcement personnel which resulted in the failure to provide adequate medical attention to the alleged serious medical needs of Decedent.

II. STATEMENT OF FACTS

Defendant Officers Michowski and Shrewsbury were dispatched to the Taylor AC, a bar located in the City of Taylor, because Decedent, a 60 year old man, was acting in a disorderly manner. *(Defendant's Motion for Summary Judgment, Exhibit B).*

> When Officers Shrewsbury and Michowski arrived they were told by the EMT's [emergency medical technicians] that Mr. Schack was swearing at people. He was wet and muddy. Before the officers arrived, the EMT's had asked Mr. Schack if he wanted to go the hospital several times, but he refused. He appeared very intoxicated to them, but he did not appear incapacitated. It did not appear that he needed medical attention.

(Defendant's Motion for Summary Judgment, pg. 6). Decedent was arrested for disorderly intoxication at approximately 9:00 p.m. on December 28, 2002, and was transported to the Taylor Police Department and placed in a detoxification cell. *(Defendant's Motion for Summary Judgment, Exhibit B).*

There is no dispute that Decedent was highly intoxicated when he was brought to the Taylor Police Department. Affidavits and deposition testimony submitted by both parties illustrate to the Court that Decedent had an

alcohol level of .35[1] which is four times the legal limit pursuant to MCL §257.625; the Decedent was incapable of standing or walking unassisted; Decedent was incapable of taking off own his shoes and other clothing to be logged in as his property[2]; Decedent's speech was slurred; and Decedent could not be processed (photographed, finger printed) due to Decedent's inability to hold himself up and stand still.

Since Decedent could not be processed, he was escorted from the booking room to the detoxification cell. Plaintiff alleges that:

> [A] minute after being placed in the cell, Mr. Schack stood, lost his balance and fell to his left, then to his right, violently striking his head against the block wall. He came to rest with his upper torso on the concrete bench with his legs on the floor of the cell. One of the Defendants while walking in the hallway adjacent to the cell heard Mr. Schack fall through open slots in the cell and merely looked into the cell.

(Plaintiff's Response to Motion for Summary Judgment, Exhibit B, CD #1, Booking Bench 1, frame 1900).

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[1] Defendants assert that they did not measure Decedent's blood alcohol level at the time he was arrested. However, Defendants do not dispute the .35 alcohol level in their dispositve pleadings.

[2] Cadet Krieger initially states that he assisted Decedent with removing his clothing and accessories because Cadet Krieger believed that Decedent would "possibly" refuse to cooperate based upon the feedback he received from the arresting officers. However, Cadet Krieger also testified that the way Decedent was being handled was also due to his intoxication. *(Plaintiff's Response to Summary Judgment, Exhibit B, pp. 29-32).*

> This cell is constructed of concrete cinder block on three walls with glass windows on the other, supported by steel. Access to the cell is through a steel door. The cell measures approximately 4 feet by 8 feet.

Id.

Defendants assert that Cadet Yesta, who came on duty at 11:50 p.m., observed Decedent sleeping and snoring, but did not actually go into the detoxification cell to check on Decedent until 3:53 a.m. *(Defendant's Motion for Summary Judgment, Exhibit D, pp. 7-14 and 17).* Cadet Yesta testified that he continued to hear Decedent snoring and believed he was trying to "sleep-off" his intoxication. *Id.* Cadet Yesta also testified that Decedent did not look ill or in need of medical attention when he last checked on Decedent which was approximately 7:30 a.m. Decedent had still not been processed, and Cadet Yesta informed Cadet Ronald Jones, who came on duty at approximately 7:50 a.m., about that fact. *(Id. Exhibit G).* Cadet Jones checked on Decedent approximately every 15-20 minutes according to Exhibit F of Defendants' Motion for Summary Judgment. However, the log does not specify the name of the Decedent as the inmate that was checked on by Cadet Jones. Cadet Michalik was on duty from 8:00 a.m. until 4:00 p.m. He testified that he heard Decedent breathing and snoring throughout the morning. *(Id. at Exhibit H).*

At approximately 12:05 p.m., Cadet Joseph Lyson came on duty and likewise observed Decedent sleeping and snoring. *(Id. Exhibit I, pp. 39, 44, 60-61).* However, at approximately 12:15 p.m., Decedent did not appear to be breathing and there was some discoloration to his face. Plaintiff asserts that Decedent was dead at that time and had already been dead for at least two hours prior to

Cadets Lyson and Michalik's discovery of the body. *(Plaintiff's Response to Motion for Summary Judgment, Exhibit D, pg. 8 & Exhibit F, ¶6).* Defendants do not dispute this fact, but rather state that after the fire department arrived, CPR was initiated and Decedent was transported to Heritage Hospital, at which time Decedent was pronounced dead on arrival at the hospital. *(Defendants' Motion for Summary Judgment, Exhibits H & J).* Decedent's cause of death was determined to be a "subdural hemorrhage sustained as a consequence of a presumed fall." *(Plaintiff's Response to Motion for Summary Judgment, Exhibit E).*

III. STANDARD OF REVIEW

According to Fed. R. Civ. P. 56(c), when a party moves for summary judgment, "[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Cox v. Kentucky Department of Transportation,* 53 F.3d 146, 149-150 (6th Cir. 1995).

The movant bears the burden of demonstrating the absence of all genuine issues of material fact. *Gregg v. Allen-Bradley, Co.,* 801 F.2d 859, 861 (6th Cir. 1986). "This burden may be discharged by showing . . . that there is an absence of evidence to support the nonmoving parties' case." *Celotex Corp. v. Catrett,* 477 U.S. 317, 325 (1986). Once the movant meets this burden, the non-movant must come forward with specific facts showing that there is a genuine issue for trial. *Matsushita Electric Industrial Co.,*

Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). However, if the evidence is insufficient to reasonably support a jury verdict in favor of the nonmoving party, the motion for summary judgment will be granted. *Street v. J. C. Bradford & Co.*, 886 F.2d 1472, 1477 (6th Cir.1989). Thus, "[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Anderson, supra,* 477 U.S. at 252.

Finally, the Sixth Circuit has concluded that, in the "new era" of summary judgments that has evolved from the teachings of the Supreme Court in *Anderson, Celotex,* and *Matsushita,* trial courts have been afforded considerably more discretion in evaluating the weight of the nonmoving party's evidence. *Street, supra,* 886 F.2d at 1480; *Anderson, supra; Celotex, supra; Matsushita Electric Industrial Co., Ltd., supra.* The nonmoving party must "do more than simply show that there is some metaphysical doubt as to the material facts." *Id.* If the record taken in its entirety could not convince a rational trier of fact to return a verdict in favor of the nonmoving party, the motion should be granted. *Id.*

IV. APPLICABLE LAW & ANALYSIS

A. 42 U.S.C. §1983 Eighth Amendment Claim (Cadets and Officers)

The Eighth Amendment, the right to be free from cruel and unusual punishment while incarcerated, does not apply to pretrial detainees. *Graham ex rel. Estate of Graham v. County of Washtenaw,* 358 F.3d 377, 382 (6th Cir. 2004); *Roberts v. City of Troy,* 773 F.2d 720, 723 (6th Cir. 1985). The Fourteenth Amendment's Due Process

Clause, however, affords pretrial detainees a right to adequate medical treatment that is analogous to the Eighth Amendment right of prisoners. *Roberts v. City of Troy,* 773 F.2d at 723. In the context of medical care for prisoners and detainees, it is well established that "deliberate indifference to a prisoner's [or detainee's] serious illness or injury states a cause of action under § 1983." *Estelle v. Gamble,* 429 U.S. 97, 105 (1976). Since it is undisputed that Decedent was a pretrial detainee, analysis under the Fourteenth Amendment is appropriate.

B. 42 U.S.C. §1983 Fourteenth Amendment Claim (Cadets and Officers)

1. Deliberate Indifference

Plaintiff, as a pretrial detainee, is protected from the deprivation or lack of medical treatment under the Due Process Clause of the Fourteenth Amendment. *Napier v. Madison County, Kentucky,* 238 F.3d 739, 742 (6th Cir.2001); *Horn v. Madison County Fiscal Ct.,* 22 F.3d 653, 660 (6th Cir. 1994). As restated by the Sixth Circuit, the "deliberate indifference" standard has an objective and subjective component. The objective component requires an inmate [or pretrial detainee] to show that the alleged deprivation is "sufficiently serious." As the Supreme Court explained in *Farmer,* "[T]he inmate [or pretrial detainee] must show that he is incarcerated under conditions posing a substantial risk of serious harm." *Farmer v. Brennan,* 511 U.S. 825, 834 (1994). To satisfy the subjective component, an inmate must show that prison officials had "a sufficiently culpable state of mind." *Id., Brown v. Bargery,* 207 F.3d 863, 867 (6th Cir. 2000).

a. Subjective Component

In order to satisfy the subjective component of *Farmer,* Plaintiff must present sufficient evidence that Defendants knew or should have known that Decedent's condition and injuries were of such severity that he required immediate medical attention. The Supreme Court has equated deliberate indifference with "criminal recklessness." 511 U.S. at 837 (1994). That is, a defendant must know of and disregard a substantial risk of serious harm. *Id.* The inquiry is subjective: "[T]he official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Id.* It is insufficient for a plaintiff to allege that there existed a danger of which an officer should have been aware. *Id.* at 838. Deliberate indifference is something more than negligence. *Id.* at 835. Also, "prison officials who actually knew of a substantial risk to inmate health or safety may be found free from liability if they responded reasonably to the risk, even if the harm ultimately was not averted." *Id.* at 844.

In this case, it is undisputed that Decedent was so intoxicated that he could not stand or walk on his own. Decedent was so intoxicated that he could not be processed at the police station due to his physical inabilities, which resulted from his extreme intoxication. It is also undisputed that Decedent fell in his cell while in the custody of Taylor Police Department. Although Defendants argue that Decedent had a history of falling due to his history of alcoholism, the fact remains that Decedent fell on December 28, 2002, while in the detoxification cell at the Taylor Police Department. According to the Taylor Police Prisoner Processing policies, "[p]risoner[s] under the influence of alcohol or narcotics shall be lodged in the detoxification

cell." *(Defendants' Motion for Summary Judgment, Exhibit M, pg. 6, ¶ (f)(3)).* The Defendant cadets followed this procedure. However, another rule states that if the prisoner is "injured, unconscious, severely chemically impaired (incapacitated) and mentally ill," those prisoners "shall not be accepted for detention in the City of Taylor lock-up facility." *(Id. at pg. 10, ¶(F)(1)).*

The facts demonstrate that Decedent was severely impaired due to his intoxication. Moreover, Defendant Krieger testified that a person was deemed incapacitated in his opinion if they were: unable to stand on their own feet; vomiting; unconscious or if conscious, unaware of who he is, where he is or why he is there. *(Plaintiff's Response to Motion for Summary Judgment, Exhibit C, pg. 56).* Defendant Pilchak identified an incapacitated person as one who is "vomiting, incoherent, has no idea what's going on, can't speak to you, can't walk on their own [or] needs to be carried." *(Id. at Exhibit K, pg. 31).* The fact that Decedent could not stand on his own, could not walk on his own and was not coherent enough to complete the booking process indicates to the Court that the testimony of the Defendants creates a genuine issue of material fact regarding whether Decedent should have been detained in the lock up – even in the detoxification cell when he first arrived at the Taylor police station.

In addition to this testimony, Defendant Krieger stated in his deposition that he knew that Decedent was in danger of falling in his cell due to his intoxication. *(Id. at Exhibit C, pp. 33-34, 60).* The Court finds that there is a genuine issue of material fact that the Defendants were aware that Decedent was extremely intoxicated from which the inference could be drawn that a substantial risk of serious harm existed (falling onto the concrete and

cinder block surfaces of the cell). Apparently, such an inference was drawn as evidenced by Defendant Krieger's testimony. There is no genuine issue of material fact as to whether Defendants, after drawing such an inference, should have known Decedent required medical attention.

b. Objective Component

To satisfy the objective component, Plaintiff must present evidence that he was detained "under conditions posing a substantial risk of serious harm." *Farmer,* 511 U.S. at 834. Decedent did not request medical care while at the Taylor Police Department and refused medical treatment from the emergency medical technicians at the time he was arrested on December 28, 2002. *(Defendants' Motion for Summary Judgment, Exhibit A).* However, despite that fact, the Court must determine if there is a genuine issue of material fact as to whether Decedent was being detained "under conditions posing a substantial risk of serious harm." *Farmer,* 511 U.S. at 834. In other words, the Court must look to whether Decedent was denied medical attention for a significant amount of time because of Defendants' actions or inactions and whether any delay in Decedent's treatment caused by Defendants rises to the level of a Due Process violation.

In examining whether a claimed injury is "sufficiently serious," courts look to the effect of any delay in treatment caused by an officer's inaction. Specifically, a pretrial detainee "who complains that delay in medical treatment rose to a constitutional violation must place verifying medical evidence in the record to establish the detrimental effect of the delay in medical treatment to succeed." *Napier,* 238 F.3d at 742; *see also Gaudreault v. Municipality of*

Salem, 923 F.2d 203, 208-09 (1st Cir. 1990) ("The 'seriousness' of an inmate's needs may also be determined by reference to the effect of the delay of treatment.")

Defendants do not address the issue of delay in medical treatment. Rather, they argue that they had no knowledge of Decedent's head injury, nor did anything occur which would have led them to believe that Decedent was in need of medical care. Therefore, Defendants could not have been deliberately indifferent regarding Decedent's medical condition. Plaintiff attached the affidavit of Werner Spitz, M.D., who testified that: "[i]t is further also my opinion with a reasonable degree of medical certainty if Lawrence Schack would have received medical attention following his injury and prior to his death he would have survived." *(Plaintiff's Response to Motion for Summary Judgment, Exhibit F, ¶9).* The Court finds that the detrimental effect of Decedent not being treated for his head injury (his subsequent death) as attested to by Dr. Spitz raises a sufficient question of material fact as to the seriousness of Decedent's head injury.

Since the subjective and the objective components have been met in this case, the Court finds that there is a genuine issue of material fact that Decedent's Fourteenth Amendment rights were violated when he was placed in the detoxification cell and when medical treatment was not provided.

C. Qualified Immunity

The doctrine of qualified immunity shields public officials acting within the scope of their official duties from civil liability. *See Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982). Qualified immunity is "an immunity from suit

rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." *Mitchell,* 472 U.S. 511, 526 (1985) (emphasis in original). The Supreme Court has emphasized that questions of qualified immunity should be resolved "at the earliest possible stage in the litigation." *Saucier v. Katz*, 533 U.S. 194, 201 (2001) *(quoting Hunter v. Bryant,* 502 U.S. 224, 227 (1991) (per curiam)). The Supreme Court has set forth a two-prong test that must be applied to a qualified immunity analysis. *Id.*

The first prong is a threshold question, namely: "[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" *Id.* If the answer is in the negative, then the inquiry ends. If a violation could be established, the second prong requires an examination of whether "the right was clearly established" at the time of the events at issue. *Id.* In order for a right to be clearly established, the "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* at 202. The inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Id.* at 201. As the Court explained, "[t]he relevant dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* at 202. It is not necessary that the "very action in question has previously been held unlawful." *Danese v. Asman,* 875 F.2d at 1242. Rather, the unlawfulness of the action must be apparent to the official "in the light of pre-existing law." *Id.*

The Court in this case has found that there is sufficient evidence to present to a jury the question of whether there has been a constitutional violation of Decedent's due process rights. In order for the individually named Defendants to be immune from liability in this case, there must be a finding that the violated constitutional right was so clearly established that a reasonable official in the same position would have understood that there was an affirmative duty to act or to refrain from engaging in the conduct at issue.

There can be no doubt that in 1987 existing law clearly established the right of pretrial jail inmates to receive care for their serious medical needs. *Anderson v. Creighton,* 483 U.S. 635, 639, (1987). Therefore, the unlawfulness of allowing several hours to pass without checking on Decedent, given his condition and the acknowledged danger Decedent was in due to his inability to stand or walk or communicate well, would have been apparent to a reasonable official (Defendant cadets and officers) "in the light of pre-existing law."[3] Moreover, the Prisoner Processing Policy specifically states:

> Each prisoner shall be visually observed by a jailer or another person assigned by the supervisor-in-charge of the station at least every 15

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[3] The Court recognizes that there is evidence in the record that Decedent may have been checked on every 15-20 minutes the morning of December 29, 2002, beginning at approximately 8:00 a.m. However, between approximately 9:00 p.m., December 28, 2002, and 7:30 a.m., on December 29, 2002, according to Defendants, Decedent was only checked twice during that ten hour span of time. The Court reviewed the DVD submitted as Exhibit B. The DVD makes clear that a genuine issue of material fact exists as to whether Decedent's condition should have been more thoroughly monitored during the time in question.

> minutes . . . Unruly, **intoxicated**, violent **prisoners**, or prisoners exhibiting unusual behavior **should be observed more frequently or closely.**

(Defendant's Motion for Summary Judgment, Exhibit M, pg. 19, ¶2(b)). Decedent falls into the category of prisoners who needed to be monitored more frequently and closely. The City of Taylor's own policy regarding "custodial responsibility," was not followed in this case. The Court finds that the individually named Defendants in this case are not entitled to qualified immunity in this matter.

V. STATE LAW CLAIMS (CADETS AND OFFICERS)

A. Gross Negligence

MCL §691.1407(2); MSA §3.996(107)(2) provides that governmental employees are immune from tort liability if they are acting within the scope of their authority, are engaged in the discharge of a governmental function and their conduct "does not amount to gross negligence that is the proximate cause of the injury or damage." The statute defines "gross negligence" as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL §691.1407(2)(c); MSA §3.996(107)(2)(c).

Plaintiff argues that summary judgment would be improper as to this claim because there are genuine issues of material fact regarding whether the Defendant cadets/officers were grossly negligent. Summary judgment is precluded in cases in which reasonable jurors honestly could have reached different conclusions with regard to whether the Defendants' conduct amounted to gross negligence. *Harris v. Univ of Michigan Regents,* 219 Mich.App 679, 694; 558 NW2d 225 (1996). In light of the

fact that the Court has already found that a genuine issue of fact has been established relative to the Fourteenth Amendment due process constitutional violation, the Court agrees with the Plaintiff and finds that Plaintiff has presented sufficient evidence from which reasonable jurors could conclude that the individual Defendants were grossly negligent in their handling of the Decedent. Summary judgment as to this issue is denied.

B. Battery

A battery is defined as "the willful touching of the person of another by the aggressor or by some substance put in motion by him; or, as it is sometimes expressed, a battery is the consummation of the assault." *People v. Bryant,* 80 Mich. App 428, 433; 264 NW2d 13 (1978) *quoting Tinkler v. Richter*, 295 Mich. 396, 401; 295 NW 201, 203 (1940). The Michigan Supreme Court has defined assault as "apparent or actual present ability to commit a battery as long as the victim's apprehension of imminent injury is reasonable." *People v. Reeves,* 458 Mich. 236, 246; 580 NW2d 433 (1998). The only evidence presented to the Court of intentional contact between the Decedent and the Defendant cadets/officers was when these Defendants were assisting Decedent to stand, to walk to be processed, and when checked on while in the detoxification cell. This degree of contact does not rise to the level of a battery committed upon Decedent. Plaintiffs battery claim is dismissed.

C. Intentional Infliction of Emotional Distress

The tort of intentional infliction of emotional distress is defined in *1 Restatement Torts, 2d, § 46, pp 71- 72.* Its

elements are: (1) extreme or outrageous conduct, (2) which intentionally or recklessly, (3) causes (4) extreme emotional distress. *Id.* Extreme or outrageous conduct has further been defined as conduct so outrageous in character and so extreme in degree that it goes beyond all possible bounds of decency and is regarded as atrocious and utterly intolerable in a civilized community. *1 Restatement Torts, 2d, § 46, Comment d, pp 72-73.* Liability will not be found for mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. *Id.* The law will not intervene in every case where a plaintiffs feelings are hurt. *Id.*

No evidence has been produced that would demonstrate to the Court that these Defendants engaged in such extreme or outrageous conduct in their handling of the Decedent in this case. Nor is there any evidence of emotional distress presented by the Plaintiff. Plaintiffs infliction of emotional distress claim is dismissed.

VI. 42 U.S.C. §1983 MUNICIPAL LIABILITY CLAIM

The essence of Decedent's 42 U.S.C. § 1983 claim is that Decedent suffered a violation of his right to adequate medical care and treatment while in custody and the Taylor Police Department's policy regarding "custodial responsibility," "cell assignments," and "injured/sick prisoners" and its failure to train its cadets and officers regarding those policies, led to that constitutional violation. This claim implicates the familiar principles set forth in *Monell v. Department of Social Services,* 436 U.S. 658, 694 (1978).

In *Monell,* the Supreme Court held that municipalities can be sued directly under 42 U.S.C. § 1983 where the

action of the municipality itself can be said to have caused the harm, as when "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." *Id.* at 690. Municipal liability for the actions of employees may not be based on a theory of respondeat superior. *Monell* went on to clarify that municipal liability may be predicated upon grounds other than explicit expressions of official policy. Although the touchstone of a 42 U.S.C. § 1983 action against a government body is an allegation that official policy is responsible for a deprivation of rights protected by the Constitution, local governments, like every other § 1983 "person," by the very terms of the statute, may be sued for constitutional deprivations visited pursuant to governmental "custom" even though such a custom has not received formal approval through the body's official decisionmaking channels. *Id.* at 690-91.

The U.S. Supreme Court addressed the issue of municipal liability under § 1983 when the plaintiff has alleged that his or her rights were violated as a result of a municipality's failure to train its police officers adequately. In *City of Canton v. Harris,* 489 U.S. 378 (1989), the plaintiff had been arrested and brought to the police station, whereupon she slumped to the floor on two separate occasions and was left lying there. The plaintiff brought a 42 U.S.C. § 1983 action against the city for failure to train its officers to recognize when a person in custody is in need of medical assistance. The Court held that the inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact. This rule is

consistent with the Court's admonition in *Monell,* 436 U.S., at 694; and *Polk County v. Dodson,* 454 U.S. 312, 326 (1981), that a municipality can be liable under 42 U.S.C. § 1983 only where its policies are the "moving force [behind] the constitutional violation." Only where a municipality's failure to train its employees in a relevant respect evidences a "deliberate indifference" to the rights of its inhabitants can such a shortcoming be properly thought of as a city "policy or custom" that is actionable under § 1983. *Id.,* 489 U.S. at 388-89. (footnote omitted).

The Court finds that Plaintiff has established a sufficient showing of material fact to prevent the dismissal of its failure to train cause of action for three reasons. First, as previously stated, policies were in place regarding "custodial responsibility," "cell assignments," and "injured/sick prisoners," however, they were not followed by more than one cadet/officer. Second, Plaintiff has submitted affidavit testimony from W. Ken Kataris who is a Florida Law Enforcement Officer/Instructor and Consultant in both Law Enforcement and Corrections. *(Plaintiff's Response to Motion for Summary Judgment, Exhibit J).* Mr. Kataris states that based upon his review of this case, "[t]he City of Taylor Police Department did not adequately train the individual defendants to implement its policy and recognize those persons who because of alcohol ingestion were in need of medical treatment and/or were a danger to themselves." *(Id. at pg. 3, ¶D(6)).* Finally, Cadet Jason Michalik testified that outside of the education he obtained to earn his law enforcement degree, any additional training was "primarily on the job." *(Defendants' Motion for Summary Judgment, Exhibit E, pg. 5).* The Court finds that this evidence taken together presents a genuine issue of material fact as to whether the City of

Taylor trained its cadets and officers regarding its "custodial responsibility," "cell assignments," and "injured/sick prisoners," policies and how they apply to severely intoxicated prisoners.

A. Municipal Liability (Fourteenth Amendment Violation, Gross Negligence, Battery, and Infliction of Emotional Distress)

"Except as otherwise provided in this act, a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function." *M.C.L.A. §691.1407.* Governmental immunity shields the government's agencies and its highest appointive executive officials from any tort liability arising from their performance of governmental functions. *MCL 691.1407.* Governmental functions are activities "expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance." *MCL 691.1401(f).* There are very few exceptions to this broad spectrum of governmental immunity (highway defects, public buildings, government owned vehicles). This case does not come within any of the exceptions and, therefore, the City of Taylor is immune from liability relative to the above mentioned state law claims.

As for the Fourteenth Amendment claim, as previously stated, *Monell* held that municipal liability for the actions of employees may not be based on a theory of respondeat superior. The only way for the City of Taylor to be liable for the above stated constitutional violation, gross negligence, battery, and infliction of emotional distress in this case is under doctrine of respondeat superior since the underlying acts, which would give rise to these causes of

action, can only be vicariously performed through City of Taylor cadets and officers by the City of Taylor.

Therefore, Plaintiff's claims against the City of Taylor for the above cited constitutional violation is dismissed.

VII. CONCLUSION

For the foregoing reasons, Defendants' Motion for Summary Judgment is GRANTED IN PART AND DENIED IN PART. Defendants' Motion for Summary Judgment relative to the Plaintiff's state tort claims against the City of Taylor (gross negligence, intentional infliction of emotional distress and battery) and Plaintiff's intentional infliction of emotional distress and battery claims against Defendant cadets and officers is GRANTED. Plaintiff's Fourteenth Amendment claim against the Defendant cadets and officers, Plaintiff's failure to train claim against the City of Taylor, and Plaintiff's state law claim of gross negligence against the Defendant cadets and officers is DENIED.

IT IS HEREBY ORDERED that Defendant's Motion for Summary Judgment is GRANTED IN PART AND DENIED IN PART.

IT IS ORDERED that Defendant's Motion for Summary Judgment is GRANTED as to the Plaintiffs state tort claims against the City of Taylor (gross negligence, intentional infliction of emotional distress and battery) and Plaintiff's intentional infliction of emotional distress and battery claims against Defendant cadets and officers.

IT IS ORDERED that Defendant's Motion for Summary Judgment is DENIED as to Plaintiff's Fourteenth Amendment claim against the Defendant cadets and

officers, Plaintiff's failure to train claim against the City of Taylor, and Plaintiff's state law claim of gross negligence against the Defendant cadets and officers.

IT IS ORDERED that the parties appear for a status conference on April 18, 2005, at 3:45 p.m., at the Theodore Levin United States Courthouse, 231 West Lafayette Boulevard, Room 251, Detroit, Michigan.

/s/ Denise Page Hood
Denise Page Hood
United States District Judge

Date: Mar 23 2005

APPENDIX C

No. 05-1481

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JERRI SCHACK, PERSONAL REPRESENTATIVE FOR THE ESTATE OF LAWRENCE SCHACK, DECEASED, Plaintiff-Appellee, v. CITY OF TAYLOR, ET AL., Defendants-Appellants.	)	ORDER (Filed Jul. 25, 2006)

BEFORE: SUHRHEINRICH, ROGERS, and COOK, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk